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IN THE

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Communications Commission's policy of awarding preferences in comparative broadcast licensing proceedings to certain applicants on the basis of their owners' minority status violates the equal protection component of the Fifth Amendment.

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS[1]

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members throughout the United States. WLF engages in litigation in matters promoting the free enterprise system and the economic and civil liberties of individuals and businesses.

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[1]Counsel for all parties have consented to the filing of this *amicus* brief. Their consents are on file with the Clerk of this Court.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination. In its pursuit of its view that the Constitution and the civil rights laws protect all citizens against discrimination, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in the area. *See, e.g., City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

This brief will bring relevant matter to the attention of the Court that will not be brought to the attention of the Court by other parties because of the unique perspective of WLF in its commitment to a free market where individuals can compete without suffering from intentional discrimination because of the color of their skin.

STATEMENT

1. The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* (1982) ("Communications Act"), requires the Federal Communications Commission ("FCC") to advance the "public convenience, interest, or necessity" in comparative licensing proceedings. *Id.*, § 307(a); *see also* § 309(a). To fulfill that mandate, the FCC has structured its comparative review process to achieve both the "best practicable service to the public" and "a maximum diffusion of control of the media of mass communications." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965) ("1965 Policy Statement"). In these comparative proceedings, the FCC has traditionally engaged in both a "quantitative" and "qualitative" analysis of competing applicants for broadcast licenses (Pet. App. 4a). The quantitative analysis focuses on each applicant's proportional integration of ownership into management

(*id.*); the qualitative analysis focuses on each applicant's "experience, background, and knowledge of the community" (*see TV 9, Inc. v. FCC*, 495 F.2d 929, 936 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) (citation omitted)).

Prior to 1973, the FCC did not consider race-based factors in its comparative licensing proceedings. *See TV 9, Inc. v. FCC*, 495 F.2d at 936. In *TV 9*, however, the United States Court of Appeals for the District of Columbia Circuit rejected the FCC's position that "the Communications Act, like the Constitution, is color blind." *Id.* The court thus concluded that, "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded" to a minority-owned applicant in the comparative licensing process. *Id.* at 938. Two years later, the court of appeals rejected the FCC's decision to accord such preferences to minority applicants only where the applicants proved a nexus between race and program diversity, concluding that the integration of minorities into station management *presumptively* promotes that diversity. *See Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975).

In response, the FCC modified its policy to require consideration of the degree of minority ownership, among other factors, at the qualitative stage of the comparative licensing process (Pet. App. 4a). Pursuant to that policy, the FCC began to award preferences to applicants to the extent that certain "minorities," including Blacks, individuals with Hispanic surnames, American Eskimos, Aleuts, American Indians, and Asian-Americans, held ownership interests in the potential licensees. *See Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 978, 980 n.8 (1978). The FCC adhered to its new policy over the next decade. Indeed, in 1982, Congress passed the Communication Amendments Act of 1982, Pub. L. No.

97-259, 96 Stat. 1087 (1982) ("1982 Amendment"), which accorded the FCC the discretion to use a lottery system in lieu of its traditional comparative hearing process, and mandated that the FCC incorporate a similar minority preference into that lottery system, if adopted. *See* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 41 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2237, 2285 (pointing to *TV 9* as a "landmark case").

In 1986, however, the FCC initiated a nonadjudicatory proceeding to examine whether its racial preference policies violate the equal protection standards of the Constitution. *See Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd. 1315 (1986) ("Reexamination"). Before the FCC could conclude its Reexamination, however, Congress passed a continuing resolution that precluded the FCC from using any congressionally-appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of, [its] policies . . . to expand minority and women ownership of broadcasting licenses. . . , other than to close [the Reexamination] with a reinstatement of prior policy. . . ." Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987) ("1988 Appropriations Act"). On January 14, 1988, therefore, the FCC terminated its Reexamination and reinstated its policy of according racial preferences in comparative licensing proceedings (Pet. App. 51a).[2]

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[2]In two subsequent appropriations bills, Congress restated its ban on the FCC's use of appropriated funds to examine this policy. *See* Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Departments of Commerce, Justice (continued...)

2. In 1982, Petitioner, Metro Broadcasting Inc. ("Metro"), filed an application for a license to use a new television channel that the FCC had assigned to the City of Orlando, Florida (Pet. App. 2a-3a, 65a). Because two other companies -- Winter Park Communications ("Winter Park") and Rainbow Broadcasting Company ("Rainbow") -- filed competing applications for the same license, an administrative law judge ("ALJ") of the FCC conducted a comparative hearing to evaluate the three applicants (*id.* at 3a, 65a). At the outset, the ALJ disqualified Rainbow for a "lack of candor" in its application (*id.* at 66a). He then awarded the license to Metro because, in his view, Metro had a quantitative advantage over Winter Park that, coupled with its qualitative enhancements, made Metro the "overwhelming comparative winner" (*id.*).

The FCC's Review Board reversed the ALJ's decision to disqualify Rainbow and to award the license to Metro (Pet. App. 66a). In considering all three applicants from a quantitative perspective, the Board concluded (1) that Winter Park was clearly inferior to both Metro and Rainbow, and (2) that Rainbow had a slight quantitative advantage over Metro based on the degree of ownership integration with management (*id.* at 86a-87a). It then credited Rainbow, which had 90 percent minority ownership participation, with a qualitative advantage over Metro, which had only 19.8 percent minority ownership (*id.* at 87a). It thus concluded that, "although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs Metro's local residence

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[2](...continued)
and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

and civic participation advantage" (*id.* at 88a). For these reasons, the Board awarded the license to Rainbow (*id.* at 90a). On October 18, 1985, the FCC declined to review the Board's decision (*id.* at 62a).

3. Winter Park and Metro appealed, arguing principally that the FCC's minority preference policy violates the equal protection component of the Constitution (Pet. App. 2a). Before the court of appeals could address the case, however, the FCC initiated its own Reexamination of the constitutionality of its minority preference policy (*id.* at 49a). The court thus remanded the case for a determination whether the minority preference was "of decisional significance" to the issuance of the license to Rainbow (*id.* at 49a, 58a-59a).

On remand, in March 1987, the FCC concluded that the "deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to Metro" (Pet. App. 57a). The FCC initially decided to hold the case in abeyance until the completion of its Reexamination (*id.*). But, in February 1988, after Congress "defunded" its Reexamination in the 1988 Appropriations Act, the FCC reinstated its earlier order upholding the Review Board's decision to award the license to Rainbow (*id.* at 50a-51a).

4. The court of appeals then reinstated the appeal and, in a 2-1 decision, affirmed the FCC's decision. The majority concluded (Pet. App. 10a) that "the legality of the FCC's use of a qualitative enhancement for minority ownership is easily resolved" on the basis of the court of appeals' prior decision in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). The majority noted that, in *West Michigan*, the court had concluded that the FCC's minority preference policy "easily passe[d] constitutional muster" because (1) the policy required consideration of minority ownership as

only one factor in a multi-factor comparative proceeding, and (2) Congress had endorsed this "remedial measure" in its 1982 Amendment (Pet. App. 10a-11a, quoting *West Michigan*, 735 F.2d at 613-14).

The majority further concluded that none of this Court's recent decisions "has undermined the holding in *West Michigan*" (Pet. App. 11a-12a). The majority found that the Court's decision in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), did not "repudiate[]" its two earlier decisions on which the court of appeals in *West Michigan* had relied (Pet. App. 12a); that a majority of the Justices in *Croson* continued to view *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as "good law" (Pet. App. 12a); and that none of the opinions in *Croson* disgreed with Justice Powell's conclusion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that "racial diversity [is] a constitutionally permissible goal, independent of any attempt to remedy past discrimination" (Pet. App. 13a). Finally, the majority determined that the FCC's racial preference policy "is more similar to the *Fullilove* program found constitutional than to the *Richmond* plan" (*id.*), reasoning that the FCC policy considered minority ownership as only one of several factors in the comparative review process (*id.* at 13a-14a), and had "Congress' express approval" in both the 1982 Amendment and the 1988 Appropriations Act (*id.* at 14a-15a).

Judge Williams dissented from the majority's constitutional analysis. He found that this Court's decisions in *Croson* and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), had "largely undermined" the court of appeals' decision in *West Michigan* (Pet. App. 18a). In his view, the FCC's "non-remedial" purpose for its minority preference policy -- *i.e.*, fostering diversity in programming -- is not a justification that survives strict scrutiny under the *Croson* Court's equal protection analysis (*id.*). He

likewise questioned whether Rainbow's asserted purpose for the FCC's racial preference policy -- *i.e.*, remedying lingering effects of prior discrimination against minorities -- could survive strict scrutiny analysis (*id.* at 30a). He found that it was "highly doubtful" that Congress, in its appropriations bills, had clearly mandated such a remedial program (*id.* at 30a-31a), and that Congress' 1982 "finding" of minority underrepresentation in broadcasting was an uncertain predicate for a race-based program (*id.* at 39a-42a). Finally, he found that the FCC's policy, in any event, was not "narrowly tailored" to achieve these goals (*id.* at 43a-45a).

SUMMARY OF ARGUMENT

A. The FCC's minority preference policy, which makes distinctions among applicants for broadcast licenses on the basis of race, is constitutionally suspect. A majority of this Court has recently confirmed that, to survive an equal protection challenge, such a race-based classification must withstand strict scrutiny: it must be "narrowly tailored" to achieve a "compelling" governmental interest. Nothing in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), supports the application of a different standard in this case. To the contrary, the race-based action of a federal administrative agency that lacks both Congress' unique law-making authority and an unambiguous congressional mandate to adopt race-conscious remedies -- like the FCC -- demands the strictest of judicial scrutiny.

B. Neither of the asserted purposes for the FCC's race-based policy is sufficiently compelling to justify a racial preference. This Court has suggested that only "remedial" purposes, *i.e.*, those designed to remedy the effects of identifiable discrimination, constitute compelling governmental purposes. The FCC's diversity rationale, which rests on the notion that increased

minority representation in broadcasting will promote programming diversity, does not meet this standard. Moreover, Justice Powell's separate opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), does not support the FCC's effort to establish a proper non-remedial predicate for its program. A university's First Amendment *right* to assemble a diverse student body, which Justice Powell relied on in *Bakke*, is distinct from the FCC's First Amendment-related *goal* of promoting diversity in programming. Indeed, using race-based means of achieving the FCC's diversity goal tends only to reinforce racial stereotyping.

Congress has not, moreover, provided a remedial justification for the FCC's minority preference scheme. The texts of neither the 1982 Amendment to the Communications Act nor the recent appropriations bills reference such a purpose. Nor does Congress' reference in legislative history to the underrepresentation of minorities in broadcasting provide the necessary remedial justification. Congress linked that "underrepresentation" to no particularized discrimination by either the FCC or the broadcasting industry. To conclude that Congress provided a remedial purpose for the FCC's policy, in the absence of any affirmative evidence of discrimination, would be to allow Congress to dictate impermissible racial balancing.

C. Even if "compelling" governmental interests are found to underlie the FCC's policy, it would still fail for a lack of "narrow tailoring." The FCC's race-based policy is completely unnecessary to promote diversity in programming because market forces have already achieved that goal. The FCC, moreover, has not attempted to address any problems of low minority participation in broadcasting with race-neutral means; limit the policy's duration to account for the achievement of its goals; or minimize the burden that the policy places on non-minority applicants who

compete for scarce broadcast licenses. The FCC's policy cannot, therefore, survive strict scrutiny review.

ARGUMENT

THE FCC'S POLICY OF AWARDING PREFERENCES IN COMPARATIVE BROADCAST LICENSING PROCEEDINGS TO CERTAIN APPLICANTS ON THE BASIS OF THEIR OWNERS' MINORITY STATUS VIOLATES THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967), *quoting Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Nonetheless, the FCC makes distinctions among applicants in comparative broadcast licensing proceedings on the basis of race. Under this Court's "strict scrutiny" analysis, the FCC's minority preference policy can survive equal protection challenge only if it serves a "compelling" governmental interest and is "narrowly tailored" to achieve that goal. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989) (reaffirming standard of review expressed by plurality in *Wygant*). The FCC's policy cannot survive such strict judicial scrutiny.

A. Governmental Classifications On The Basis Of Race Are Constitutionally Suspect And Subject To Strict Judicial Scrutiny

1. We begin by explaining the standard of judicial review applicable to this case. The Court has long

recognized that racial classifications inevitably "carry a danger of stigmatic harm." *Croson*, 109 S. Ct. at 721. Contrary to the constitutional concept of equality, they tend to reinforce unfounded racial stereotypes and "promote notions of racial inferiority." *Id.* And they infringe upon an individual's constitutionally protected "'personal right[]' to be treated with equal dignity and respect" under the law. *Id.* Accordingly, a majority of this Court has recently confirmed that all race-based decision criteria must withstand "strict scrutiny" to survive equal protection review. *Croson*, 109 S. Ct. at 721 (Part III-A); *id.* at 735 (Scalia, J., concurring); *see also id.* at 752 (Marshall, J., dissenting) (noting majority's adoption of strict scrutiny standard).

Under this standard, an official race-based classification, like the FCC's minority preference policy in this case, cannot pass constitutional muster unless the government's goal is "compelling" and the means selected are "narrowly tailored" to the fulfillment of that goal. *Wygant*, 476 U.S. at 274; *see Croson*, 109 S. Ct. at 721-22. The purpose of this strict scrutiny of racial classifications is clear: "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool . . . [and to] ensure[] that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 109 S. Ct. at 721.

2. The court below failed to subject the FCC's minority preference policy to this strict judicial scrutiny. Instead, the majority held (Pet. App. 14a) that the FCC's race-based policy easily passed constitutional muster under the standards set forth in Chief Justice Burger's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). It is unclear whether Chief Justice Burger's opinion in *Fullilove* enjoys the support of a majority of

the Court.[3] But, in all events, nothing in his *Fullilove* opinion justifies something less than "strict scrutiny" of a race-based policy of a federal administrative agency that possesses neither (a) Congress' unique law-making authority nor (b) an unambiguous congressional mandate to adopt race-conscious remedies.

a. In *Fullilove*, the Court upheld against equal protection challenge a congressionally-established 10 percent minority set-aside program applicable to federal grants for state and local public works projects. In his opinion for a plurality, however, "Chief Justice Burger did not employ 'strict scrutiny' or any other traditional standard of equal protection review." *Croson*, 109 S. Ct. at 717; *see Fullilove*, 448 U.S. at 492. Rather, although he noted that race classifications require "close examination" (*id.* at 472), Chief Justice Burger chose to accord "appropriate deference to the Congress, a co-equal branch" (*id.*), because it had established the set-aside remedy pursuant to its "specific constitutional mandate to enforce the dictates of the Fourteenth

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[3]Both Chief Justice Rehnquist and Justice Stevens dissented in *Fullilove*. *See* 448 U.S. at 522-32 (Stewart, Rehnquist, JJ., dissenting); *id.* at 532-54 (Stevens, J., dissenting). Justice Scalia, though declining to revisit *Fullilove*, suggested in *Croson* that he did not accord much weight to any of the three opinions supporting the *Fullilove* judgment. *Croson*, 109 S. Ct. at 736 (Scalia, J., concurring). Justice Kennedy refused in *Croson* to join in the part of the opinion that hinted at continuing support for the *Fullilove* opinion. *See* 109 S. Ct. at 734 (Kennedy, J., concurring). Finally, while Justices White and O'Connor in *Croson*, 109 S. Ct. at 717-20, suggested that Chief Justice Burger's *Fullilove* opinion had continuing authority, they also indicated that only one standard of review should apply in equal protection cases. *Id.* at 721-22; *Wygant*, 476 U.S. 285-86 (O'Connor, J., concurring). Thus, there is reason to believe that a majority of the Court now agrees with Justice Powell that congressional acts should not be subject to a distinct standard of judicial review. *See Fullilove*, 448 U.S. at 496 (Powell, J., concurring); *cf. Bakke*, 438 U.S. at 299 (plurality opinion).

Amendment." *Croson*, 109 S. Ct. at 719. In so doing, Chief Justice Burger emphasized that "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483.

It would be inappropiate to apply a similarly deferential analysis to the constitutionally-suspect policy of a federal administrative agency. An administrative agency lacks Congress' unique law-making authority. While an administrative agency may implement congressional acts through rulemaking, that authority is plainly distinct, as this Court has recognized, from Congress' constitutional power to make law. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (Court assumed, without deciding, that Congress and the President had the authority to promulgate a law barring noncitizens from certain federal employment opportunities, but held that the Civil Service Commission did not have such authority); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law"). The power to make law resides exclusively with the duly-elected members of Congress who, through the legislative process, must engage in open debate and politically-accountable decision-making. Thus, while there may arguably be reason to subject the race-conscious actions of Congress to something less than "strict scrutiny" review, there is no reason to apply any lesser standard of review to the race-conscious actions of the FCC -- a federal agency that lacks both the inherent law-making authority and the political accountability of Congress. *See Note, The Constitutionality of Affirmative Action in Public*

Employment: Judicial Deference To Certain Politically Responsible Bodies, 67 Va. L. Rev. 1235, 1245 (1981).[4]

That federal administrative agencies, unlike Congress, possess no unique power under the Fourteenth Amendment to legislate race-based remedies only underscores the need to subject their race-conscious actions to the strictest of scrutiny. In *Fullilove*, Chief Justice Burger relied on Congress' unique powers under Section 5 of the Fourteenth Amendment to justify giving deference to Congress. The plurality opinion in *Croson* did too. But the FCC has no such unique powers and, as Justice O'Connor has explained in considering the analogous power under the Fifteenth Amendment, "[t]he breadth of authority granted to Congress under the enabling provision of the Fifteenth Amendment is not equivalent to the amount of discretion that an administrative agency possesses in implementing the provisions of a federal statute. An administrative agency is itself a creature of statute." *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 613-14 (1983) (O'Connor, J., concurring). Thus, the FCC is plainly not entitled to any special deference here.

b. Of course, had the FCC promulgated its minority preference policy in response to "'the affirmative intention of the Congress clearly expressed'"

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[4]As this Court aptly noted in *Greene v. McElroy*, 360 U.S. 474, 507 (1959):

> [E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

(*NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979); *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988)), the FCC could perhaps argue that this Court should subject its minority preference policy to a less searching standard of review. It is doubtful that such an argument could withstand the opinions of this Court, which now recognize that all race-conscious policies are subject to strict scrutiny. *See Croson*, 109 S. Ct. at 721 (Part III-A); *id.* at 735 (Scalia, J., concurring); *see also Wygant*, 476 U.S. at 273-74. But the Court need not resolve this question because the FCC lacks the unambiguous congressional mandate necessary to support such an argument.

Congress has directed the FCC in comparative licensing proceedings only to follow the "public convenience, interest, or necessity" standard (47 U.S.C. § 307(a); *see also* 47 U.S.C. § 309(a)). While this mandate is "expansive" (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969)), it does not constitute a "clearly expressed" grant of authority to legislate race-conscious remedies. *See Community Television v. Gottfried*, 459 U.S. 498, 509 n. 14 (1983) (Court held that the "general words 'public interest'" did not mandate that FCC enforce the Rehabilitation Act of 1973); *NAACP v. FPC*, 425 U.S. 662, 670 (1976) ("the use of words 'public interest' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination"). *Cf. Dellmuth v. Muth*, 109 S. Ct. 2397, 2401 (1989), *quoting Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("[W]e will conclude Congress intended to abrogate sovereign immunity only if its intention is 'unmistakably clear in the language of the statute'"); *Hoffman v. Conn. Dept. of Income Maintenance*, 109 S. Ct. 2818, 2824 (1989) (same). Indeed, in its original 1965 Policy Statement, the FCC recognized, contrary to its claim today, that its "public interest" mandate required "color blind" selec-

tion criteria in comparative licensing proceedings. *See Mid-Florida Television Corp.*, 33 F.C.C. 2d 1, 17-18 (Rev. Bd.), *review denied*, 37 F.C.C. 2d 559 (1972), *rev'd, TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). To now suggest that Congress, in enacting the Communications Act, unambiguously mandated the FCC's adoption of race-conscious policies is thus completely untenable.

None of Congress' subsequent legislative actions, moreover, has codified the challenged minority preference policy or elevated that policy to the status of a congressional enactment. To be sure, in the 1982 Amendment and the recent appropriations bills, Congress manifested some support for a minority preference policy by the FCC. But the 1982 Amendment merely requires the FCC to utilize minority preferences *if* it selects broadcast licensees through a lottery system. And the appropriations bills only "order a kind of mental standstill" (Pet. App. 35a), by prohibiting the FCC from using allocated funds to reexamine its minority preference policies. These manifestations simply do not constitute unambiguous, affirmative legislation mandating race-conscious remedies in the FCC's comparative licensing proceedings. *Compare Fullilove*, 448 U.S. at 468 (noting that Congress made the critical judgments) *and Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 16-18 (1981) (noting that the Court will not infer congressional intent to impose an affirmative Fourteenth Amendment obligation on the states unless Congress does so "unambiguously"); *see also TVA v. Hill*, 437 U.S. 153, 190 (1978) (recognizing that appropriations measures normally do not command the same authoritative weight as "substantive enactments" because they "have the limited and specific purpose of providing funds for authorized programs"); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 843 n.6 (1982); *National Treasury Employees*

Union v. Devine, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984).

On the contrary, the 1982 Amendments and the appropriations bills do not change the fundamental character of the FCC's policy as an administrative, rather than congressional, act. It is undeniable that the FCC adopted its race-based policy in the 1970s -- before either the 1982 Amendment or the appropriations bills -- in the absence of any explicit congressional mandate to do so. And it is likewise undeniable that the FCC adopted that administrative policy without the type of legislative fact-finding and deliberation that Congress, had it legislated such a race-based policy in the first instance, would have been bound to follow. *See Fullilove*, 448 U.S. at 490; *id.* 503-06, 511-13 (Powell, J., concurring); *see generally* Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference To Certain Politically Responsible Bodies*, 67 Va. L. Rev. at 1247. This administrative policy must be subject to the strictest of judicial review.

B. The FCC's Minority Preference Policy Cannot Survive Strict Scrutiny Because It Serves No Compelling Governmental Purpose

Because the court below applied the wrong standard of review, it failed to determine whether the FCC's minority preference policy serves a sufficiently "compelling" governmental interest to justify a racial classification. The FCC, however, claims that its policy is necessary to enhance program diversity (*id.* at 19a). Rainbow, on the other hand, asserts that the FCC's policy is necessary to cure the effects of past discrimination against minorities in the broadcasting industry (*id.* at 18a). Neither justification can survive strict scrutiny review.

1. The FCC's diversity rationale rests on the notion that increased *minority ownership* in broadcasting, achieved through racial preferences in the licensing process, will promote diversity in *programming*. It is unclear whether this governmental objective -- *i.e.*, promoting diversity in programming -- is even constitutionally legitimate.[5] In all events, it is quite clear that

[5]The objective assumes that the FCC can lawfully regulate the content of speech. Government generally may not attempt to do so. *See Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972); *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 8 (1986). To be sure, this Court has held that, because of the scarcity of available broadcast frequencies, the FCC can regulate the content of speech to some degree. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). But the Court has also held that the FCC may only impose content-based restrictions that are "narrowly tailored to further a substantial governmental interest." *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). The FCC's efforts to promote programming diversity may now fail this test.

In initially sustaining limited FCC regulation of the content of speech, the Court presumed that such regulation was necessary to ensure public access to viewpoint diversity. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. The FCC has now determined that the interest of the public in viewpoint diversity is fully served by market forces. *See Deregulation of Radio*, 84 F.C.C. 2d 968, 978, *reconsid. denied*, 87 F.C.C. 2d 797 (1981), *aff'd in relevant part, Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1443 (D.C. Cir. 1983). Thus, the goal of government-controlled program diversity may now be insufficiently substantial to survive First Amendment scrutiny (much less equal protection scrutiny). *See Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd. 5043, 5052 (1987) (In retracting the Fairness Doctrine, FCC noted that, "[b]ecause [it] imposes substantial burdens upon the editorial discretion of broadcast journalists and, because technological developments have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest"), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied* 1990 U.S. LEXIS 38 (1990).

this governmental interest is not sufficiently "compelling" to justify a racial preference.

a. No opinion of the Court has explicitly delineated the class of governmental interests that are sufficiently "compelling" to justify a racial classification. A majority of the Court has recently suggested, however, that such classifications must be "strictly reserved for remedial settings." *Croson*, 109 S. Ct. at 721 (Opinion of O'Connor, J.); *id.* at 736, 737-38 (Opinion of Scalia, J.); *see also id.* at 730 (Opinion of Stevens, J.) (disagreeing with the premise that "seems to underlie today's decision, as well as the decision in *Wygant v. Jackson Board of Education*, that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong") (citation omitted). That suggestion is, with perhaps one exception,[6] fundamentally sound constitutional law, and requires rejection of the FCC's programming diversity rationale in this case.

"Classifications based on race carry a danger of stigmatic harm." *Croson*, 109 S. Ct. at 721. "[T]hey may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* For these reasons, a majority of the Justices in *Croson* quite properly concluded that racial classifications must be limited to situations in which there are findings of prior, identified unlawful discrimination. *See id.* at 721-23,

[6]The single exception concerns instances in which a social emergency rising to the level of imminent danger to life and limb, or to national security, exists. *See Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan, Stewart, J., concurring). A similar exception exists in First Amendment doctrine. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (exception for "inciting or producing imminent lawless action").

727-28, 730 (Opinion of O'Connor, J.); *id.* at 735-38 (Opinion of Scalia, J.).

As Justice Powell has explained, "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated." *Bakke*, 438 U.S. at 307. "Without such findings of constitutional or statutory violations," however, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another" on the basis of race. *Id.* at 308-09. To hold otherwise would allow government to engage in race-based social engineering, contrary to the most fundamental purposes of the equal protection component of our Constitution. *Id.* at 310; *see also Croson*, 109 S. Ct. at 721 (Opinion of O'Connor, J.); *id.* at 735-738 (Opinion of Scalia, J.).

b. Relying on Justice Powell's opinion in *Bakke*, however, the FCC contends that "programming diversity" is a sufficiently compelling governmental interest to justify a racial preference. Of course, given Justice Powell's opinion for the plurality in *Wygant*, it is entirely unclear whether Justice Powell continued after *Bakke* strongly to hold the view that "diversity" concerns may justify a racial preference; and, as explained above, the opinions in *Croson* suggest that there is not a majority among the current Justices to subscribe to any such "diversity" rationale. In all events, the "diversity" rationale to which Justice Powell subscribed in *Bakke* provides no support for the FCC's diversity rationale in this case.

In *Bakke*, Justice Powell found the "attainment of a diverse student body [to be] a constitutionally permissible goal for an institution of higher education." 438 U.S. at 311-12. But he did so because of the important place that "academic freedom" occupies under the First

Amendment. That constitutionally-favored freedom, according to Justice Powell, required that equal protection guarantees have sufficient bend to allow a university to select a student body that it believed would create "[t]he atmosphere of 'speculation, experiment and creation' . . . so essential to the quality of higher education." *Id.* at 312.

A university's constitutionally-protected interest in maintaining a diverse student body, however, is quite distinct from the FCC's interest in diversity in broadcast programming. In promoting programming diversity, the FCC is not itself engaging in any speech and has no constitutionally-protected speech interest. While the FCC's diversity interest may have support in the "First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources'" (*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978), quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)), it is at bottom only a legislative and administrative *goal*, and not a First Amendment *right* (as is an educational institution's First Amendment *right* to assemble a diverse student body). Thus, while a university may have a "contervailing" (*Bakke*, 438 U.S. at 313) First Amendment interest sufficient to allow it a limited right to consider applicants on the basis of their minority status, the FCC has no countervailing constitutional right that justifies treating its interest in programming diversity as sufficiently compelling to allow a racial classification.

That the FCC's interest in diversity of programming is not sufficiently "compelling" to justify a constitutionally-suspect racial classification is, in fact, evident from Justice Powell's opinion in *Bakke*. Justice Powell's opinion listed four distinct purposes that the racial preference at issue in that case might have served. *See* 438 U.S. at 305-06. The third of these

purposes was the alleged governmental interest in increasing the number of doctors who would serve minority communities. *Id.* at 310-11. Justice Powell agreed with the state court below that minority medical school graduates might be more likely to practice in minority communities than the average white medical school graduate would (*id.* at 310-11) -- just, as here, the FCC suggests that a minority broadcaster might, arguably, be more likely to program for minority audiences than would a typical white broadcaster. But Justice Powell also agreed with the lower court that there were "more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race." *Id.* at 311 (citation omitted). So, too, the Court should conclude here that the FCC's goal of increasing minority-responsive programming is not sufficiently compelling to justify the racial stereotype upon which the FCC's minority preference is based.

Racial classifications that promote the achievement of diverse student bodies are arguably less invidious than other such classifications because, as the dissent in this case noted (Pet. App. 21a), "[e]thnic diversity in the classroom enables those present to see individual members of ethnic groups as they are." Diverse broadcast station ownership, on the other hand, does not have a similar effect; listeners and viewers cannot see the ethnicity of various licensees' owners. Thus, the FCC's minority preference policy only reinforces, rather than erases, racial stereotypes: it is based on the presumption that minority owners will produce minority programming fit for a minority audience -- which is precisely the type of impermissible stereotyping that this Court has rejected as inconsistent with fundamental equal protection principles. *See Croson*, 109 S. Ct. at 721; *id.* at 730-34 (Stevens, J., concurring); *id.* at 735, 739 (Scalia, J., concurring).

2. Although the FCC has expressly renounced any remedial rationale for its minority preference policy (*see* Pet. App. 33a), Rainbow argues that Congress has provided the requisite remedial justification for the policy (*id.* at 18a). Congress' legislative actions with respect to the FCC's minority preference policy, however, fall far short of providing that remedial justification.[7]

Congress did not include a remedial rationale for the FCC's minority preference scheme in the text of either the 1982 Amendment or the subsequent appropriations bills. The 1982 Amendment only mentions the FCC's non-remedial "diversity" goal; it provides that the FCC, if it adopts a lottery system, must grant "significant preferences" to minority applicants if doing so "would increase the diversification of ownership of the media of mass communications." Pub. L. No. 97-259, 96 Stat. 1087 (1982). The appropriations bills, moreover, do not contain *any* rationale for their prohibition on the use of appropriated funds to reexamine the FCC's minority preference policy. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989). In short, based on their express terms, these enactments provide no remedial purpose for the policy.

The legislative history provides no further basis for believing that Congress had a remedial purpose in

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[7]Although Rainbow's precise position before this Court is unclear, it suggests that "underrepresentation" of minorities in broadcasting, alone, might justify the FCC's policy (Opp. Cert. 8, 10). Of course, if the FCC's policy serves to advance proportionate representation of minorities in broadcasting, it would be impermissible as "discrimination for its own sake." *Bakke*, 448 U.S. at 307. We assume, therefore, as the dissent below does, that Rainbow instead seeks to justify the FCC's policy as a remedy for past discrimination.

enacting these laws. The only arguably relevant comment appears in the Conference Report to the 1982 Amendment, where the conferees stated:

> [T]he effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2287. The conferees, however, never linked this "severe underrepresentation" either to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry. Thus, it cannot suffice as evidence of a remedial purpose -- for to accept such unconnected "societal discrimination" as evidence of a remedial purpose would effectively allow Congress to impose race-conscious remedies at any time and in any circumstance. *See Croson*, 109 S. Ct. at 722-28.

Fullilove is not to the contrary. In *Fullilove*, the plurality was convinced that Congress was attempting to remedy an underrepresentation in minority contractors specifically attributable to past discrimination in public contracting opportunities. *See* 448 U.S. at 477-78 (Opinion of Burger, C.J.); *id.* at 497-98, 503 (Opinion of Powell, J.). Here, by contrast, Congress has not purported to find any such discrimination in the broadcast licensing field. Indeed, the FCC has explicitly disclaimed that any such discrimination can be found. *See* FCC Br. on Rehearing En Banc at 18, *Steele v. FCC*, 806 F.2d 1126 (D.C. Cir. 1986).

Justice Powell's opinion in *Fullilove* thus makes clear that, even if the legislative history of the 1982 Amendment can properly be read as asserting a remedial purpose, the FCC's minority preference policy still could not stand. Just as Justice O'Connor's opinion in *Croson* makes clear that a state "cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists" (109 S. Ct. at 725), so too does Justice Powell's opinion in *Fullilove* make clear that a congressional finding of past discrimination must be "reasonable" and justified by "affirmative evidence." *Fullilove*, 448 U.S. at 503-04 n.4 (Powell, J., concurring); *see also id.* at 502-06 & n.8. Here, there is absolutely no evidence of prior discrimination in the issuance of broadcast licenses or against would-be minority broadcasters. Accordingly, any asserted remedial purpose would be unreasonable and more properly viewed as a pretext for attempted racial balancing.

C. The FCC's Minority Preference Policy Is Not A Narrowly-Tailored Means Of Ensuring Diverse Programming Or Redressing Past Discrimination

The court below also failed to conduct the second inquiry under the Court's equal protection analysis: whether the FCC's minority preference policy is "narrowly tailored" to achieve either the FCC's diversity goal or Rainbow's remedial goal. This Court has made clear that a number of factors are relevant to determining whether a remedy is narrowly tailored: the necessity for race-conscious relief and the efficacy of alternative non-race-based remedies; the availability of meaningful waiver provisions; the planned duration of the remedy; and the effect of the remedy on third persons. *See Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 280 n.6; *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *Sheet Metal*

Workers v. EEOC, 478 U.S. 421, 475-81 (1986) (plurality opinion). Had the court below considered these factors, it could only have concluded that the policy is not a constitutionally-permissible means of achieving either goal.

The FCC has no basis for suggesting that the minority preference scheme is necessary to achieve programming diversity because that goal has already been attained. The FCC has found that market conditions have already made, and will continue to make, broadcast programming sufficiently diverse. *See Deregulation of Radio*, 84 F.C.C. 2d 968, 978, *reconsid. denied*, 87 F.C.C.2d 797 (1981), *aff'd in relevant part*, *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Indeed, in recently retracting its Fairness Doctrine, the FCC noted the "explosive growth in both the number and types of [information] outlets in every market." *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd. at 5051 (citation omitted). It added that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today." *Id.* (quotation omitted). Accordingly, the FCC's intrusion into the market through a race-based classification is completely unnecessary and not properly part of a "narrowly tailored" government program.

The FCC's preference policy also ignores potential non-race-based measures for increasing minority ownership and, so the argument goes, programming diversity. The FCC has determined that the primary barrier to increased minority representation in broadcast ownership is lack of access to capital and credit. *See Strategies for Advancing Minority Ownership in Telecommunications, Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission*, (1982). Therefore, an FCC policy that

provides means-based financing to potential licensees could, without relying on racial criteria, achieve the FCC's desired end of increased minority access and programming. *See Croson*, 109 S. Ct. at 728 ("[i]f MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation"). Moreover, if the FCC's goal is indeed to achieve "optimal diversity" in programming, the FCC could rely on its licensing proceedings to determine, on a case-by-case basis, those individual licensees most likely to add a unique perspective to programming or to serve a distinct sector of the population. *Cf. Bakke*, 438 U.S. at 311. Both of these approaches provide a lawful and non-racial means of attaining diversity in both broadcast ownership and programming.

The FCC's preference policy likewise fails to "fit" Rainbow's stated remedial goal with more precision than any alternative non-race-related means. *See Wygant*, 476 U.S. at 280 n.6, citing Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n. 26 (1974). Unlike the minority set-aside program upheld in *Fullilove*, which provided for rebuttal of congressional assumptions in the administrative process (448 U.S. at 487), the FCC's preference policy erects an effectively irrebuttable presumption of disadvantage stemming from past societal discrimination. It provides no mechanism for disproving that discrimination has impaired the ability of individual minority broadcasters to obtain a license. The FCC's failure to provide such a mechanism, when its licensing scheme rests on case-by-case determinations, demonstrates that the policy plainly could be

better tailored to achieve its purported goal. *See Croson*, 109 S. Ct. at 728.[8]

Furthermore, the FCC's minority preference policy is not narrowly tailored because it is unlimited in duration. The policy assumes, with respect to its diversity goal, that minority owners have distinct interests and perspectives and will reflect these differences in their programming. But, as the dissent properly concluded (Pet. App. 22a), there is no basis for finding that any nexus between minority *ownership* and minority *programming* even exists. The FCC has been unable to prove or disprove this nexus because Congress has defunded its Reexamination of its licensing preferences. Moreover, Congress' "finding" that such a nexus exists is merely a conclusory and predictive judgment in the legislative history to the 1982 Amendment (*see* Pet. App. 22a-23a, *Shurberg Broadcasting, Inc. v. FCC*, 876 F.2d 902, 923-24 (D.C. Cir. 1989), *cert. granted*, 48 U.S.L.W. 3427 (U.S. Jan. 8, 1990) (No. 89-700)), and a conclusory assertion in the appropriations bills. *See, e.g.*, S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987) ("Diversity of ownership results in diversity of programming and improved service to minority and women audiences"). A Congressional Research Service Report, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988), which purports to prove this link, does little to

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[8]That the FCC's preference scheme is not tailored to the goal of redressing past discrimination is facially evident from the provision's applicability to numerous racial and ethnic groups, including Aleuts, American Eskimos, American Indians, Asian Americans, Blacks and Hispanic-surnamed individuals, without any explanation of whether, or in what manner, these groups have suffered identifiable discrimination. *See Wygant*, 476 U.S. at 284 n.13. Indeed, the policy's sweeping scope completely undermines Rainbow's contention that *any* remedial rationale exists for the FCC's preferences.

resolve the debate because, as the dissent below exhaustively explains (Pet. App. 23a-26a), it is defective on both methodological and conceptual grounds.

Even assuming that such a nexus exists, the FCC's purported goal -- to achieve some sort of optimal diversity of programming -- is undefined and seemingly not definable. Thus, neither the FCC nor members of the general public will be able to determine if and when this elusive target is met -- if it has not already been met. *See* discussion, *supra*, at 26. Likewise, absent past findings of identifiable discrimination which would enable the FCC to determine when the effects of that discrimination had been cured, the FCC's policy has a limitless remedial time frame. For similar reasons, this Court has declined to uphold race-based policies, like the FCC's preference policy, that are "timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276.

Finally, the FCC's policy, at bottom, impermissibly places an undue burden on non-minorities. *See Wygant*, 476 U.S. at 283 (plurality struck down a race-conscious layoff provision in part because "layoffs impose the entire burden of achieving racial equality on particular individuals"). The policy deprives applicants, like Metro here, of the unique opportunity to obtain scarce broadcast licenses solely because of the race of their owners; while applicants for employment may have sufficient alternatives to justify treating a denial of a hiring alternative as insubstantial, an applicant for a broadcast license generally has no similar alternatives and suffers a substantial burden (Pet. App. 44a). Such racially-imposed burdens plainly undermine "both the letter and spirit of a constitutional provision whose central command is equality." *Croson*, 109 S. Ct. at 727.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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